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BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 189.

WESTERN TURF ASSOCIATION, PLAINTIFF IN ERROR,

vs.

HYMAN GREENBERG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED

IN THE SUPREME COURT OF THE UNITED STATES.

WESTERN TURF ASSOCIATION,
Plaintiff in Error,

vs.

HYMAN GREENBERG,
Defendant in Error.

October Term, 1906.
No. 189.

BRIEF FOR PLAINTIFF IN ERROR.

On the 23rd day of March, 1893, the Legislature of the State of California passed an Act of which the following is a copy:

"Section 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-

course, fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

"Section 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this Act, is entitled to recover from the proprietor, lessee, or their agents, or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

"Section 3. This Act shall take effect immediately."

The plaintiff in error at the times in question was conducting a race-course. For certain reasons it was unwilling that the defendant in error should have access to its grounds. The defendant in error persisted, however, in purchasing a ticket day after day, although informed by the Secretary of the Association that he would not be admitted to the track, and although he had been refused

admission about twenty-five times before the day in question. (Record, p. 13, fols. 26-27.)

On that day he succeeded in obtaining entrance to the grounds. Upon being discovered by certain officers of Morse's Police Patrol, who were acting for the Association, he was, according to their story, offered back his admission fee (one dollar) and requested to leave the track. He refused to leave and was put out by the use of force no greater than was necessary therefor.

He brought this action for damages. Upon the trial in the Superior Court for the City and County of San Francisco, the Association claimed that the statute above quoted was void as in contravention of the Fourteenth Amendment to the Constitution of the United States.

The trial judge instructed the jury to the contrary at the request of the plaintiff in the action, and refused the instructions requested by the Association, defendant. The verdict of the jury was in favor of the plaintiff for the sum of one thousand dollars damages, and judgment was entered accordingly.

Upon appeal to the Supreme Court of California, the contentions as to the unconstitutionality of the statute were repeated, and rights, privileges and immunities under the Fourteenth

Amendment were specially set up and claimed. The Supreme Court of California ruled against the plaintiff in error and affirmed the judgment of the trial court. Whereupon this writ of error was allowed by the Chief Justice of the Supreme Court of California.

In a former case of the same kind between the same parties (*Greenberg* vs *Western Turf Association,* 140 Cal., 357) the Supreme Court of California had sustained the validity of this statute, although reversing the judgment in that case upon other grounds. The opinion in this case affirms the ruling of the Court in the former case.

The following are the specifications of error, all of which are relied upon and intended to be urged, viz:

"The Superior Court erred in charging the jury as follows:

"Gentlemen of the Jury, I give you the following instructions, requested by the plaintiff:

"1. I will now read to you the Act of the Legislature entitled 'An Act making it lawful to refuse admission to places of amusement.'

" 'Section 1. It shall be unlawful for any corporation, person or association, or the proprietor,

lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

" 'Section 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this Act, is entitled to recover from the proprietor, lessee, or their agents, or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

" 'Section 3. This Act shall take effect immediately.' "

The Superior Court erred in refusing to give to the jury the following instruction requested by the defendant (plaintiff in error herein):

"I instruct you that the Act of the Legislature of California of the year 1893, which has been referred to, is unconstitutional and void."

(3.) The Supreme Court erred in affirming the judgment of the Superior Court.

(4.) The Supreme Court of California erred in affirming the action of the Superior Court in giving to the jury the instruction firstly above mentioned, and in refusing to give to the jury the instruction secondly above mentioned.

(5.) The Supreme Court of California erred in holding to be constitutional and valid the statute of California approved March 23rd, 1893, entitled "An Act making it unlawful to refuse admission to places of amusement."

ARGUMENT.

In its former decision (140 Cal., 360, 361), the Supreme Court of California cited and relied upon the following cases:

Baylies vs. *Curry*, 128 Ill., 287;
People vs. *King*, 110 N. Y., 418;
Messenger vs. *State*, 25 Neb., 674;
Joseph vs. *Bidwell*, 28 La Ann., 382;
Donnell vs. *State*, 48 Miss., 661;
United States vs. *Newcombe*, 11 Phila., 519; Federal Cases No. 15,868;
Munn vs. *Illinois*, 94 U. S., 113.

Upon an examination of these cases it will be found that in each of them, except *Munn* vs

Illinois, the decision was based upon the Civil Rights Act, so-called; the person excluded or discriminated against being a colored person, and being so excluded or discriminated against solely because he was a colored person. It requires no argument or discussion to point the inapplicability of such cases to this case. The basis of the right asserted in those cases was not the right of access to the theater, but the right to be free from discrimination on account of race, color, or previous condition of servitude.

On the other hand, the appellant (plaintiff in error here) cited to the Supreme Court of California, among others, the following cases, none of which are noticed in either of the opinions:

District of Columbia vs. *Saville,* 1 McArthur, 581 (29 Am. Rep. 616);
Sharpe vs. *Whiteside,* 19 Fed. Rep., 156;
Gibbs vs. *Tally,* 133 Cal., 373;
State vs. *Associated Press,* 60 S. W. Rep., 191;
Leep vs. *St. Louis,* 25 S. W. Rep., 575.

In the first of the above cases a statute of the district had been passed, entitled "An Act to regulate shows and exhibitions in the sale and disposal of seats." It provided in substance that

it should be unlawful after the opening of the doors to sell reserved seats, or to mark as reserved, seats which had not in fact been reserved by the sale of tickets already made. It was said by the Court:

"The provisions of the Act are attempted to be justified on the ground that it is a mere police regulation, and as such within the competence of the late Legislative Assembly to enact. We are all of the opinion that the Act has nothing whatever of the character of a police regulation, but, on the contrary, that it is unwise, vexatious and unlawful interference with the rights of private property."

In the case of *Sharpe* vs. *Whiteside*, the defendant was the owner of a popular resort known as the Point of Lookout Mountain. She made a contract with a livery-stable keeper by which his passengers only should be allowed access to the grounds. A rival livery-stable keeper obtained in the State Court, before removal, a preliminary injunction to prevent discrimination against his passengers. The injunction was dissolved by the Circuit Court. After treating of the right to control railroads and other public service corporations, it was said (page 161):

"There is no such ground for jurisdiction in the case under consideration. There is no necessity, public or other, for people to visit Lookout Point. That is a mere matter of taste, pleasure, curiosity. Commerce, the public weal, social order, the public health or comfort, have nothing to do with it." At page 173 of the Report will be found a well-considered note under the heading: "When there is no public duty there may be discrimination."

In *Gibbs* vs. *Talley*, the Supreme Court of California held to be invalid a law requiring owners of property to execute bonds in connection with building contracts. At page 376 it was said that to impose such a burden upon the owner was to some extent to deprive him of his property. And on page 377 it was further said:

"It is also an unreasonable and unnecessary restriction upon the power to make contracts (citing authorities).

"It clearly contravenes the provisions of Section 1 of Article I of the Constitution of the State, and the Fourteenth Amendment to the Constitution of the United States. It is not—and clearly it could not be—contended that this law is a regulation which comes within what is called the police power. It is not calculated, nor was it in-

tended, to conserve the safety, health, or *general* welfare of the community."

(It is not generally supposed that the public morals will be promoted by encouraging people to go to race-tracks or by forcing the proprietors to grant them admission.)

It may be gathered from the record in this case, and the former case between the same parties, that the reason for excluding the defendant in error from the grounds was that he insisted upon publishing a newspaper called a racing chart or form chart, whereas the Association had sold the exclusive privilege so to do to other persons. Surely the Association had the right to make such a contract, perhaps for the protection of the public, and for the reputation of its own grounds; as also for the profits to be directly derived from the contract.

Apart from this special statute, a ticket of admission to a place of amusement is, and always has been, merely a license. The authorities to this effect were cited in the former case, and the Supreme Court of California held in conformity with them. But if this statute be valid it is no longer possible for two persons to contract for the issuance of a license to a place of amusement. This

statute also makes it a *penal offense* (140 Cal., 364) for a person who has made a civil contract to violate it. It is understood that every person has that right, of course holding himself responsible in damages.

The plaintiff in error is a private corporation, conducting a private business, upon its own private premises. There is no suggestion that it was in anywise exercising a public use, or that it had ever received aid or special privileges from the State, or even a license to transact business.

This statute does not seek to impress upon theaters, race-tracks, etc., a use in favor of the public generally. It would of course be void if it attempted so to do. This statute is in favor of those members of the public only who have purchased tickets, and the proprietor is left free to sell or to refuse to sell tickets to whom he pleases. The statute does not require the ticket to be purchased directly from the proprietor of the theater or other place of amusement. The purchase may be made from a third person, and of course it may be effected without the knowledge of the proprietor by means of a messenger, or purchased from the railroad company selling tickets for transportation including admission, as appeared to be the case in the former action. This statute

is special as affecting only persons conducting places of amusement, and affecting only contracts for admission to such places. In that respect also it is submitted to be in violation of the Constitution in denying the equal protection of the laws.

Respectfully submitted,

W. S. GOODFELLOW,

Attorney for Plaintiff in Error.